In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 498

COLORADO RIVER WATER CONSERVATION DISTRICT AND MIDDLE PARK WATER CONSERVANCY DISTRICT, PETITIONERS

v.

FOUR COUNTIES WATER USERS ASSOCIATION AND LYNN A. MATHESON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of November 6, 1967, inviting the Solicitor General to express the views of the United States in this case.

Under the Colorado law—which follows the "prior appropriation" doctrine with respect to water rights—a court decree establishing the extent of a present right to the use of water and determining its priority over other claims may be obtained. Also, a "conditional right" may be adjudicated, whereby the priority date is established in anticipation of construc-

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tion and operation of works for appropriation of water to various uses. These four cases were brought by petitioners to establish such priorities. The trial court allowed priorities relating back to 1950. These dates were based upon investigations made by the Bureau of Reclamation of the United States Department of the Interior. The Supreme Court of Colorado reversed, holding that the activities of the Bureau of Reclamation took place under circumstances that did not reflect an intention to take water sufficient to satisfy the requirements of an initial step in an appropriation. In each case, emphasis was given to excerpts from the testimony of the Project Manager of the Bureau of Reclamation relating to the nature, purpose and effect of actions taken by the Bureau.

Since the inception of the federal reclamation program, the policy has been to execute the purpose in cooperation with local authorities and, in many details, through the medium of local irrigation districts or similar organizations. Frequently such districts secure the necessary water rights, obtain adjudications of their validity, and assign them to the United States.[1] In seeking 1950 priority dates, petitioners relied upon surveys made, and other actions taken, by the Bureau of Reclamation. The Colorado Supreme Court did not reach the question whether such actions inured to the benefit of petitioners, since it held that the requisite intent was lacking. Although the ultimate issue in these cases is

[1] Thus, no question is here presented as to the authority the United States might have to proceed without regard to the state laws of water rights. Cf. *Arizona* v. *California*, 373 U.S. 546, 588, fn. 92.

the priority date of appropriative rights under state law, the present rulings appear to have turned on the State Supreme Court's view of the limited authority of Bureau of Reclamation employees and the fact that further steps on the contemplated federal project depend upon congressional authorizations and appropriations.

This ground of decision is, in our view, unsound and prejudicial to the United States. Indeed, it appears that the physical actions here taken, if performed by agents of a non-federal irrigation district, would have been sufficient to establish priority. We do not understand that, for nonfederal appropriations, priority is held to hinge on the degree to which particular officers or employees may speak for or bind corporate directors or stockholders. Yet, here, priority rights were denied because of internal requirements of the federal government concerning detailed approval of planning and appropriation of funds. This is, we submit, an impermissible discrimination against claimants relying on Bureau of Reclamation actions.

The conditional appropriative process recognizes the importance, for purposes of planning projects and of financing them, of securing a prior right to use water. This is equally true as to economic planning of federal projects. Petitioners have detailed (Pet. 9–10, App. F 1–2) many projects, at various stages of planning or completion, that may be affected by these decisions, depending upon how they are interpreted and applied. Respondents' suggestion that statutory time limits may protect some of these projects points only to further litigation and, of course,

does not answer the problems that may be posed for other projects in the future. In the circumstances, we believe that review is warranted.[2]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1967.

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[2] Our submission is directed only to Question 1, presented by the Petition for Certiorari. If review is granted and that question is answered in the affirmative, a remand to the State courts for reconsideration, or for retrial, in that light may be appropriate.

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